IN THE

Supreme Court of the United States

October Term 1948.

No. 172

JERRY SPAGNUOLO,

Petitioner,

AGAINST

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

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CASES CITED.

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JERRY SPAGNUOLO, *Petitioner,* AGAINST UNITED STATES OF AMERICA, *Respondent.*	No. .....

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

To the Honorable the Chief Justice of the United States and the Honorable Associate Justices of the Supreme Court of the United States:

The petitioner respectfully prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Second Circuit entered on June 23, 1948, affirming a judgment of conviction in this criminal cause.

Opinions Below.

There was no opinion in the District Court.

The affirmance in the Circuit Court of Appeals was unanimous, Frank, *C. J.*, writing a supplemental opinion to clarify a statement in the opinion of Clark, *C. J.* with which he disagreed. These opinions have not yet been reported, but they are printed at the end of the certified copy of the record submitted herewith.

Jurisdiction.

The jurisdiction of this court is invoked under Rule 37(b) of the Rules of Criminal Procedure and Title 28, Section 347, United States Code.

Questions Presented.

In this case, under a single count indictment charging that the defendant-appellant in the court below on June 6, 1947, wilfully and knowingly possessed 2 and 2/5 gallons of distilled spirits consisting of alleged Johnny Walker Black Label Scotch Whiskey in 12 four-fifths quart bottles without there being affixed to the containers stamps denoting the quantity of distilled spirits contained therein and evidencing payment of all internal revenue taxes thereon, in violation of Title 26, Section 2803(a), United States Code, was it not prejudicial error to admit evidence of prior irrelevant, independent and distinct acts and crimes, to wit: the presence of petitioner here in the automobile of another man at the time of the transaction for the sale of other Scotch whiskey by said other man in or about January, 1947, to the Government's principal witness, Howard Johnson (Record on Appeal, p. 12, fols. 34, 35); and evidence of a conversation between an Alcohol Tax Unit agent and said witness on June 4, 1947, relative to a bottle of Scotch whiskey, at which conversation petitioner was not present? (Record on Appeal, p. 37, fols. 109, 110).

Objection to the admission of the said evidence was duly taken (Record on Appeal, p. 12, fol. 35; p. 37, fol. 109).

STATUTE INVOLVED.

Title 26, Section 2803, Subdivision (a), United States Code Stamps for Containers of Distilled Spirits.

(a) Requirement. No person shall transport, possess, buy, sell, or transfer any distilled spirits, unless the

immediate container thereof has affixed thereto a stamp denoting the quantity of distilled spirits contained therein and evidencing payment of all internal revenue stamps imposed on such spirits. * * *

Statement.

The evidence tended to show that on June 4, 1947, one, Howard Johnson, met Agent Silvers of the Alcohol Tax Unit in a bar and grill as a result of a conversation regarding a bottle of Scotch whiskey (R. f. 109)* that Silvers had had with the proprietor of the bar prior to said meeting. Subsequent to this meeting, a further meeting was had on the following day and an arrangement made to meet on June 6, 1947 at 3 P. M. at the same bar (R. f. 111).

On that day, June 6, 1947, at about 12:30 P. M., the witness, Howard Johnson, came out of the apartment house in which he resided and saw the petitioner in front of his house (R. f. 24). Petitioner is alleged to have told him that he had some whiskey for him (R. f. 25) inside (R. f. 29) but Johnson told him he did not have the money for it with him and asked him to wait while he got it (R. f. 29). Instead of going for the money, he went to the bar where he had made the appointment to meet Agent Silvers and pointed petitioner out to him and his partner, Agent Kearins (R. f. 30).

Agent Silvers then kept petitioner under observation for about an hour and went up to the corner where he was standing, identified himself, interrogated him as to his presence in the neighborhood and detained him (R. ff. 113, 114).

In the meantime Agent Kearins had gone to the apartment building in which the witness, Howard Johnson, resided and from the lady in charge of the building office,

*R. f. refers to folios of printed Transcript of Record.

one, Willie B. Lewis, obtained two brown paper packages (R. f. 98) which had been left with her earlier that day by a person to whom she paid no attention because she was busy (R. f. 97). When the agents brought petitioner to her for identification, the undisputed testimony of all the Government witnesses is that she stated she had never seen him before (R. ff. 104, 129, 148).

One, Clifford Johnson, the elevator operator in the building, testified that he had been approached by a white man during the morning of June 6, 1947 and asked whether he could leave a package on the elevator for Mr. Johnson (R. ff. 90, 91). He refused this request and directed the man to the building office. He was unable to identify petitioner as being the man in question when the agents confronted the witness with petitioner (R. ff. 95, 125, 147).

There was testimony to the effect that at the time in January, 1947, when the unknown person sold certain Scotch whiskey to Howard Johnson, and petitioner was present in the automobile, this person gave Johnson his telephone number where he could be reached (R. f. 36) and that Johnson called this number when ordering Scotch whiskey on June 6, 1947 (R. f. 38).

There was no testimony or evidence adduced which placed petitioner in physical possession of the liquor. Howard Johnson did not see the packages, did not see petitioner in possession of the liquor, did not receive the liquor from petitioner, nor did he pay him anything (R. ff. 78-80).

Petitioner made no admissions of any kind at or after his arrest and did not take the stand as a witness in his own behalf.

POINT I.

The admission in evidence over proper objection of testimony as to the transaction between Howard Johnson and the other man in January, 1947, when Johnson purchased Scotch whiskey was prejudicial error.

True it is that petitioner is claimed by Howard Johnson to have been present in an automobile when the purchase and sale of Scotch whiskey was made in January, 1947, but the record is barren of any evidence to indicate the slightest participation by petitioner in this transaction.

Whether or not this was a crime, because it was not proved that the said whiskey when delivered did not bear on its immediate container or containers the requisite tax stamps, makes little actual difference, for the sole purpose of the prosecution in adducing this evidence was to create an atmosphere so that it might appear to the jury that petitioner was closely connected with the sale of illicit Scotch whiskey. It is no mere coincidence that the prosecutor laid stress on the word "Scotch" when referring to the whiskey purchased in January, 1947; the bottle relative to which Agent Silvers and the proprietor of the bar had the conversation on June 4, 1947, and the 12 bottles adduced in evidence as being the subject matter of the crime charged in the indictment (R. ff. 35, 36, 37, 38, 39, 110, 115).

While it is the prosecutor's privilege and even his duty to introduce evidence which is prejudicial to a defendant, he is nevertheless precluded from adducing evidence which is both prejudicial and incompetent and it is submitted that the evidence of the transaction of January, 1947, antedating the charge made in the indictment, in which the petitioner is not claimed to have had any participation whatsoever, was wholly inadmissible for any proper purpose and should have been excluded when objected to. That it was seriously prejudicial cannot be gainsaid.

In *McCandless* v. *United States* (298 U. S. 342, 347), this court said:

> "An erroneous ruling which relates to substantial rights of a party is ground for reversal unless it *affirmatively* appears from the whole record that it was not prejudicial."

See also *Lynch* v. *United States*, 12 F. (2nd) 193, 4 Cir.; *Newman* v. *United States*, 289 Fed. 712, 4 Cir.; *Carpenter* v. *United States*, 280 Fed. 598, 600, 4 Cir.; *Bullard* v. *United States*, 245 Fed. 837, 4 Cir.; *Day* v. *United States*, 220 Fed. 818, 4 Cir.; *Rau* v. *United States*, 260 Fed. 131, 2 Cir.

POINT II.

The admission in evidence over proper objection of the testimony of agent Silvers relative to his conversation with the proprietor of the bar about a bottle of Scotch whiskey was likewise prejudicially erroneous.

In this phase of the case, it is not even claimed that the petitioner was present, yet this evidence was permitted to be introduced despite proper and timely objection. Implicit in this tstimony was the commission of a crime by either Howard Johnson or the owner of the bar, or both (R. f. 71). Admittedly, petitioner had no connection therewith. It was offered solely to point up the Scotch whiskey phase of the transaction.

If, as stated in the opinion of the court below, this testimony and the other objected to as prejudicially erroneous was entitled to admission at the trial because of its "very close connection" with the crime as charged, then obviously evidence of acts and crimes wholly separate and distinct from that charged in the indictment, was employed to forge links in the chain of circumstances leading to the verdict of guilty. This presents a genuine conflict and

raises the question of justification for the opinion of the court below.

It is not controverted that the petitioner while present did not take any part in the January transaction between Howard Johnson and the other man with whom the witness had been dealing for some time (R. ff. 45, 46) and that he was not present on the occasion of the conversation in the bar (R. f. 109). Where then is this "very close connection" to be found between this evidence so erroneously admitted and the facts of the offense charged? It might be different were the testimony that the petitioner had had a part in these transactions, but it is undisputed that he did not. This testimony had no legitimate bearing upon the question at issue (*Moore* v. *United States*, 150 U. S. 57, 61).

The case of *United States* v. *Sebo*, 101 F. (2d) 889, 891, relied on by appellee and the court below in its opinion, presented an entirely different set of facts, both as to the physical situation of the defendant there and also as to the time element. In fact at page 891, the Circuit Court of Appeals seems to offer a half-hearted apology for its affirmance by relying on a time worn and hackneyed cliche and says:

> "Even if this evidence was not strictly admissible, we cannot believe that it had any real effect on the outcome of the trial."

And as to this, see Point III.

POINT III.

The petitioner was entitled to have incompetent prejudicial evidence excluded from the jury's consideration.

Whether in fact the error complained of was what swayed the jury and caused it to bring in a verdict of

guilty cannot, of course, be known. It is sufficient if on an appraisal of the entire record, it can be said to have had a substantial influence in this respect. Or even if grave doubt is engendered as a result of this error. It is not enough that the record may disclose sufficient to support the result for the function of the appellate court is not to determine the guilt or innocence of a defendant.

Kotteakos v. *United States* (328 U. S. 750); cited in *Fiswick* v. *United States* (329 U. S. 211); *Bollenbach* v. *United States* (326 U. S. 607); *Bruno* v. *United States* (308 U. S. 287); *Bihn* v. *United States* (328 U. S. 1172).

In the recent case of *United States* v. *Corrigan, et al.*, 2 Cir., decided May 28, 1948, cited by Frank, *C. J.*, in his opinion in the instant case, the court unanimously concluded that the evidence of guilt as disclosed in the record was overwhelming, yet because of the erroneous admission of two exhibits which reflected on Corrigan's integrity a reversal of the judgment was ordered and Swan, *C. J.*, in his opinion, said:

> "Whether in fact the reports influenced the jury's verdict is of course unknown and is immaterial, for an accused is entitled to have incompetent, prejudicial evidence excluded from the jury's consideration."

CONCLUSION.

It is respectfully submitted that the questions submitted indicate serious error which warrants the exercise of this Court's supervisory jurisdiction.

Respectfully submitted,

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